

Based on Mr. Nelson's substantial assistance to the government and based on his history and characteristics, the United States moves for a downward departure, pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(a), to offense level 13.

DISCUSSION

I. The Offense Conduct.

The Probation Officer's Report sets out an accurate summary of the facts of this case. See PSR, ¶¶ 7–21. In a nutshell, this case relates to schemes and conspiracies to defraud the Federal Communication Commission (FCC)'s E-Rate program, which was created by Congress to provide funding to connect schools and libraries to the Internet. Ms. Green and her co-conspirators reached a series of agreements to rig bids on numerous projects seeking E-Rate funding located throughout the United States from 1998 through 2004. One of those conspiracies, charged in Count Twelve of the Superseding Indictment, focuses on activity related to the West Fresno Elementary School District ("West Fresno"), located in Fresno, California. Between 1998 and 2001, Mr. Nelson was the Emeryville, California branch manager for Inter-Tel Technologies, Inc., a company that sold and installed telecommunication equipment, including PBXs, data equipment, including switches and routers, and video equipment, and provided maintenance and other services as needed for the equipment it sold. In early 1999, Inter-Tel employees, supervised by Mr. Nelson, began preparing a bid for PBX, video, and data equipment in response to a request for proposal ("RFP") offered by West Fresno. The RFP stated that West Fresno intended to seek funding for such equipment from the E-Rate program.

Various employees of Inter-Tel, supervised by Mr. Nelson, discussed with Ms. Green and others the prospective bid for the West Fresno project. Thereafter, with Mr. Nelson's knowledge and approval, Inter-Tel agreed to refrain from bidding on the West Fresno project and to instead act as a subcontractor to co-defendant Howe Electric. As a result, in accordance with the agreement and with Mr. Nelson's approval, Inter-Tel refrained from submitting a bid directly to West Fresno and instead submitted a subcontract quote to co-defendant Howe Electric.

Ms. Green then successfully caused the West Fresno project to be awarded to Howe Electric as the prime contractor, with Inter-Tel as a subcontractor. Consequently, Howe Electric

1 purchased from Inter-Tel, and had Inter-Tel install, PBX, video, and data equipment at the West
2 Fresno project.

3 **II. The Guidelines Calculations.**

4 The Probation Office has concluded that Mr. Nelson's final offense level is 14 and that
5 his criminal history category is I, which results in a Guidelines range of 15 to 21 months. The
6 United States agrees with these calculations.

7 Based on Mr. Nelson's substantial cooperation in the United States' investigation, as well
8 as his history and characteristics, the United States respectfully requests that this Court depart
9 below the applicable Guidelines range to offense level 13. The basis of the United States'
10 motion is set out in more detail in Section III, infra.

11 **III. Sentencing Recommendation and Motion for Downward Departure.**

12 Under U.S.S.G. § 5K1.1, the Court may depart from the Guidelines based on a
13 defendant's substantial assistance, and may consider the following reasons when determining the
14 appropriate amount of the reduction:

- 15 A. the court's evaluation of the significance and usefulness of the defendant's
16 assistance, taking into consideration the government's evaluation of the
assistance rendered;
- 17 B. the truthfulness, completeness, and reliability of any information or
18 testimony provided by the defendant;
- 19 C. the nature and extent of the defendant's assistance;
- 20 D. any injury suffered, or any danger or risk of injury to the defendant or his
family resulting from his assistance; and
- 21 E. the timeliness of the defendant's assistance.

22 U.S.S.G. § 5K1.1. Further, this Court should consider the factors set out in 18 U.S.C. § 3553(a)
23 in determining an appropriate sentence, including the nature and characteristics of the defendant.

24 Here, Mr. Nelson provided the government with significant information and assistance
25 regarding this investigation. Although ultimately not called to testify at trial (where the number
26 of prospective witnesses totaled over 40 and 25 actually testified), Mr. Nelson provided details
27 about the events, gave context and foundation for relevant documents, and was available and
28 willing to testify at trial, had the government called him. When viewed with other information

1 the government possessed, Mr. Nelson's information proved to be accurate and reliable.
2 Throughout his cooperation, he provided truthful, candid, and complete information regarding
3 his role in the conspiracy, as well as the roles of the other defendants. Mr. Nelson's cooperation,
4 in addition to being entirely truthful, was timely. The parties agreed in principle to the terms of a
5 plea agreement long before the eve of trial.

6 Mr. Nelson was the supervisor of several employees who actually worked directly with
7 Ms. Green on the conspiratorial activities. It is unclear as to whether Mr. Nelson's employees
8 kept him abreast of the details of their behavior as things progressed in the conspiracies. As the
9 supervisor, Mr. Nelson has accepted responsibility for the activities of his subordinates, even
10 while he sought counsel from others within the corporate hierarchy. Consequently, Mr. Nelson's
11 willingness to accept responsibility for his failure to adequately supervise his subordinates is an
12 additional reason to depart to a level 13.

13 With respect to the history and characteristics of this defendant, the United States notes
14 that Mr. Nelson is an elderly man who, before being associated with co-defendant Judy Green,
15 had worked in the technology-related industry for years and had no prior history of questionable
16 conduct. The United States believes that these circumstances constitute additional support for
17 the requested departure to offense level 13.

18 For all of these reasons, although Mr. Nelson's actions were serious, the United States
19 believes that, taking into account the factors set out in U.S.S.G. § 5K1.1 and 18 U.S.C.
20 § 3553(a), Nelson's assistance has been substantial and supports a sentence below the applicable
21 Guidelines range. The United States, accordingly, asks the Court to depart downward to offense
22 level 13. This sentence level appropriately punishes Mr. Nelson for his crime and rewards him
23 for his cooperation. The United States also requests that the Court impose a \$100 special
24 assessment.

25 **IV. Restitution and Forfeiture.**

26 The victims are the entities that controlled the E-Rate funds: the FCC and the Universal
27 Services Administrative Company. A civil qui tam action produced settlements with various
28 involved companies, including Inter-Tel, which resulted in substantial civil penalties. Because

1 that action provided for a recovery of more than actual civil damages, the victims' rights have
2 been addressed.

3 With respect to the issue of forfeiture, no action is necessary.

4 **CONCLUSION**

5 Based on the defendant Earl Nelson's cooperation with, and substantial assistance to, the
6 government, his history and characteristics, and based on all of the facts of this case, the United
7 States moves for a downward departure to level 13. The Court should also impose a special
8 assessment of \$100.

9
10 DATED: March 5, 2008

11 /s/ Richard B. Cohen
12 MICHAEL F. WOOD
13 RICHARD B. COHEN
14 BRIAN J. STACK
15 JASON M. KATZ
16 ALBERT B. SAMBAT
17 ANNA TRYON PLETCHER
18 Trial Attorneys
19 Antitrust Division
20 U.S. Department of Justice
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that on this 5th day of March 2008, I caused to be served the foregoing **UNITED STATES' SENTENCING MEMORANDUM AND MOTION FOR DOWNWARD DEPARTURE RE: DEFENDANT EARL NELSON** by electronically transmitting a true copy thereof to the person and/or office of the persons set forth below:

Richard Mazer, Esq.
richardbmazer@yahoo.com
Attorney for Defendant Earl Nelson

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 5th day of March 2008 at San Francisco, California.

/s/ Richard B. Cohen
RICHARD B. COHEN
Trial Attorney